No. 14874

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA, LAUGHLIN E. WATERS, United States Attorney, and IRWIN R. WEISS,

Appellees.

APPELLANT'S REPLY BRIEF.

BERNARD B. LAVEN,
530 West Sixth Street,
Los Angeles 14, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Rules

Statutes

No. 14874

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA, LAUGHLIN E. WATERS, United States Attorney, and IRWIN R. WEISS,

Appellees.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

This brief would be unduly extended unless it were largely confined to replying to appellee's principal contentions, with as little repetition as possible of the argument set forth in appellant's brief heretofore filed. Accordingly, failure to comment in this brief upon a particular statement of facts or assertion by appellee is not necessarily to be construed as acquiescence therein.

The appellee attempts to recite the facts most favorable to the appellant by carefully selecting a few excerpts, omitting those statements which were uncontroverted by the government in its opposing affidavits.

These facts are set forth on pages 7 and 8 of appellant's brief, and establish fraud and deceit on the part of Special Agent Weiss, and therefore it is unnecessary to repeat them again.

ARGUMENT.

I.

Appellee Admits Jurisdiction of the District Court.

Appellee concedes that the District Court had jurisdiction to grant the relief sought in an appropriate case, but fails to define it.

The complaint in the instant case was a civil action for the return of property and a permanent injunction against its use in any future criminal proceedings [Tr. 4]. No criminal proceedings had been filed or were pending during the entire proceedings in this case.

The Notice of Appeal herein [Tr. 67] was filed on June 27, 1955, prior to the indictment, which was not returned until August 31, 1955 [Tr. 75].

The various Circuit Courts do hold that it is the beginning of the proceedings which determines the appealability of the order. (*See Nelson v. United States* (D. C. Cir., 1953), 208 F. 2d 505, 516-517.) However, the courts are in accord that if there is a triable issue presented by the affidavits, a hearing shall be had before trial to determine whether the evidence has been obtained in violation of an individual's Constitutional rights. See *United States v. Sinerio* (3rd Cir., 1951), 190 F. 2d 397, cert. den., 343 U. S. 814.

It is obvious that the present case comes within the holdings of *In re Fried* (2nd Cir., 1947), 161 F. 2d 453, cert. den., 331 U. S. 858, and *Weldon v. United States* (9th Cir., 1952), 196 F. 2d 874, which expressly approves the procedure which was followed in the instant case.

In the case of *In re Fried* (2nd Cir., 1947), 161 F. 2d 453, cert. den., 331 U. S. 858, the precise question that

confronted the court was whether a hearing had been improperly denied to a petitioner who sought to suppress a confession. The court held that a motion to suppress would lie before indictment. Two of the judges who constituted the majority, Learned Hand and Frank, disagreed as to the scope. Judge Frank deemed it applicable to any allegedly illegally obtained confession, while Judge Learned Hand would limit it to confessions obtained in violation of the Fifth Amendment.

In the *Weldon* case the court said at page 875:

> "If Seth had been indicted or informed against, and if the resulting criminal action had been pending when the petitions were filed, Seth's petition would have been merely incidental to the criminal action * * * Actually, as stated above, Seth was not indicted or informed against; hence, no criminal action was pending against him when the petitions were filed. Hence both petitions were independent proceedings. Obviously, these were civil proceedings, in effect civil actions, to recover personal property and to enjoin an allegedly wrongful use."

A careful analysis of the facts in each of the cases cited by appellee clearly demonstrates that each case was decided on facts different from those in the instant case, and therefore are not applicable.

In *Powers v. United States,* 223 U. S. 323, the defendant voluntarily took the witness stand and became a witness before the Court Commissioner, and testified.

The cases of *United States v. Burdick,* 214 F. 2d 768; *Montgomery v. United States,* 203 F. 2d 887; *Turner v. United States,* 222 F. 2d 926; and *Himmelfarb v. United States,* 175 F. 2d 924, cited by appellee, do not support its position, because in each of those cases the suspected

taxpayer was given an opportunity to refuse to answer any question that was propounded to him by the government agent, and was advised that any admission made would be voluntary. Also, the decisions avoided deciding the issue of waiver of Constitutional rights directly by stating that this was a question of admissibility and the weight of the evidence.

The case of *Blumberg v. United States* (5th Cir., 1955), 222 F. 2d 496, 499, relied upon by appellee, is factually distinguishable and does not support appellee's contention, because in that case it was held that the defendant, voluntarily and without any reservations, discussed the matter of his tax liability frankly and fully with a government agent in an effort to reach an agreement as to such liability and obtain a settlement thereof. Needless to say, this judgment of conviction was reversed on other grounds.

Under the Fifth Amendment, it is not permissible to compel any person in any criminal case to be a witness against himself; yet the law requires every taxpayer to make and file income tax returns and to permit his records of income to be examined by government agents, and such required evidence is admissible against the taxpayer in a criminal action if the taxpayer fails to claim his Constitutional privilege when the information is required of him. However, when the taxpayer does waive his Constitutional privileges, such waiver must be intentionally made after he has had a knowledgeable and understanding choice between waiving and standing upon them. (See *Ray v. United States* (5th Cir., 1936), 84 F. 2d 654, 656.)

In the instant case, Special Agent Weiss never gave the appellant the choice of refusing to answer any question

or giving him any books and records; and also, Special Agent Weiss suppressed the fact that he was seeking evidence for a criminal prosecution.

The appellee also cites the case of *United States v. Vloutis* (5th Cir., 1955), 219 F. 2d 782, which likewise is not in point, for the reason that in that case it does not appear that the Revenue Agent and Special Agent, at the time they called upon the bookkeeper of the defendant, had been informed that a criminal violation had been committed. They obtained permission from the bookkeeper and the partner to inspect the books. It should be noted that the case was reversed and the matter remanded with instructions to grant appellant's motion for acquittal on Counts Two and Four and his motion for a new trial on Counts One and Three.

In *Benes v. Canary* (6th Cir., 1955), 224 F. 2d 470, the court at 472 said:

> "The ruling upon the issue of unlawful search and seizure depended largely upon the interpretation to be given to certain testimony of the appellant, together with an evaluation of the credibility of the witnesses."

The case of *Scanlon v. United States* (1st Cir., 1955), 223 F. 2d 382, likewise does not support the government's position, because the court stated at 384:

> "* * * The net worth statement was signed at the request of a Revenue Agent, but there is no evidence of any duress, coercion, fraud, or trickery employed by the government in obtaining it, and the trial court so found."

Appellee seeks to make some point to the effect that the appeal is moot, claiming that there is no property to

be returned, although admitting that the complaint does include an action for the return of property, and relies upon the reasoning in *Cogen v. United States,* 278 U. S. 221, and *United States v. Rosenwasser* (9th Cir., 1944), 145 F. 2d 1015. However, it is believed that the language in the *Rosenwasser* case following the quotation cited by appellee is an answer to the appellee's contention, wherein the court said:

> "We believe the reasoning of the *Cogen* case determines the result in the instant case, as there are no essential factors in the one distinguishing it from the other, and it should be noted that in each of the instances, they were not separate proceedings, but were taken while the criminal actions were pending."

In Paragraph V of the complaint [Tr. 6], it is alleged that Special Agent Weiss made a transcript of the books and records, checks, receipts, invoices, etc. * * *, and in the prayer, in paragraph 3, appellant asks for an order to return all of the transcripts and copies of records, books, invoices, checks, and other physical records and objects.

The case of *Silverthorne Lumber Co. v. United States,* 251 U. S. 385, answers appellee's contention that the appeal has become moot because no property was taken from the appellant. In that case, the defendants had been indicted and arrested, and while they were detained, officers went to the company's offices and took all the books, papers, and documents and photographed them. The District Court ordered that the search and seizure by the officers violated the Constitutional rights of the parties and further ordered the indictment dismissed. A new indictment was returned, based upon the information thus obtained, and the Supreme Court held that under these

circumstances the government was neither entitled to use the original documents nor any knowledge obtained therefrom, and said at page 392:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall be used before the court, but it should not be used at all."

See also:

Gouled v. United States, 255 U. S. 298, 307;

Nardone v. United States, 308 U. S. 338, 380.

II.

The Record Does Not Support the Trial Court's Finding That Appellant Understandingly and Knowingly Waived His Constitutional Rights.

The appellee attempts to distinguish between an actual illegal search and seizure and a situation where one has waived his Constitutional rights and consented to a search by fraud and deceit.

Under the decisions, there appears to be no such distinction; and it is significant to note that appellee has not cited any authority in support of its position.

Self-incrimination is the same whether raised under the Fourth or the Fifth Amendment.

United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93;

McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191.

A search and seizure carried out by fraud and deceit is equally violative of Constitutional rights whether made subsequent to entry by force and violence or to entry procured by stealth and fraud.

Gouled v. United States, 255 U. S. 298, 305-306.

In the case of *Fraternal Order of Eagles No. 778 v. United States* (3rd Cir., 1932), 57 F. 2d 93, at 94, the court said:

> "A search made as the result of an entry by physical force is not necessary in order to violate the Fourth Amendment. That Amendment was designed to protect the individual against the abuse of official authority. Search and seizure following an entry into the house or office of a person suspected of crime by means of fraud, stealth, * * * are unreasonable and violative of the Fourth Amendment."

See also:

United States v. Mitchneck (D. C., 1933), 2 Fed. Supp. 224;

United States v. Guerrina (D. C. E. D., Pa., 1953), 112 Fed. Supp. 126, 128.

Basically, the crucial issue in this case is whether the appellant was deprived of his Constitutional rights under both the Fourth and Fifth Amendments by the conduct of the Special Agent, and whether his waiver of these privileges was understandingly and knowingly given.

The authorities are all in accord that it must appear that the consent was freely and voluntarily given.

Kovach v. United States (6th Cir., 1931), 53 F. 2d 639.

In *Turner v. United States* (4th Cir., 1955), 222 F. 2d 926 at 931, the court says that the relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute.

Appellee makes mention that appellant failed to cite *Chieftain Pontiac Corp. v. Julian* (1st Cir., 1954), 209 F. 2d 657, but neglects to point out that this case was dis-

missed by the Court of Appeals for lack of jurisdiction, because the appellant therein attempted to appeal while a motion to vacate an order and make findings was still pending in the lower court.

See Judge Woodbury's concurring opinion, page 660.

III.

The Appellant Had No Notice That the Court Was Proceeding Under Rule 41(e), Federal Rules of Criminal Procedure, Instead of Rule 56(c), Federal Rules of Civil Procedure.

Appellee finally maintains that appellant was given a hearing and contends that there was nothing to hear, placing reliance upon *Centracchio v. Garrity* (1st Cir., 1952), 198 F. 2d 282, 289; *Benes v. Canary, supra,* and other cases, in all of which hearings were granted.

See also:

United States v. Lipshitz (E. D., N. Y., 1954), 117 Fed. Supp. 466, 468, and (1955), 132 Fed. Supp. 519;

United States v. Wolrich (S. D., N. Y., 1955), 129 Fed. Supp. 528, 529.

In the instant case, it is significant that the proceeding in the lower court was commenced as a civil action for the return of property and a permanent injunction against its use in any further criminal proceedings. The appellant sought a trial to have a determination as to whether or not his Constitutional rights had been violated. This could not be accomplished on affidavits, because it cannot be determined whether a particular allegation was an expression of an opinion or an affirmation of a fact by a witness, which could be determined only upon the

facts and circumstances existing at the time that the statement was made.

Under Rule 56(c) of the Federal Rules of Civil Procedure, if the affidavits disclose a triable issue, the appellant is entitled to a trial. The rule of the lower court deprived the appellant of an important right at a trial to cross-examine adverse witnesses about crucial facts peculiarly within their knowledge, and to have a trial court observe their demeanor while testifying. It is obvious that the appellant's counsel was following Rule 56(c) of the Civil Rules when he stated, "Well, I presume this is on affidavits" (Appellee's Br. p. 22).

The record is silent as to any indication by the trial judge that the matter was to be heard under Rule 41(e) of the Federal Rules of Criminal Procedure instead of the procedure that is followed in an injunction suit, wherein the plaintiff of course has the usual right of any plaintiff to a trial on evidence, and not on affidavits.

See:

In re Fried (2nd Cir., 1947), 161 F. 2d 453, 460.

A preliminary injunction is preliminary to a hearing on the merits, and its purpose is not to determine any controverted rights but to prevent a threatened wrong or the doing of any act, pending the final determination of the action, whereby rights may be threatened or endangered, and to maintain things in the condition in which they are at the time until the issue can be determined after a full hearing.

See:

Rule 65, *Federal Rules of Civil Procedure;*

American Federation of Musicians v. Stein (6th Cir., 1954), 213 F. 2d 679, 683;

Benson Hotel Corp. v. Woods (8th Cir., 1948), 168 F. 2d 694, 696, 697;

Missouri-Kansas Texas R. Co. v. Randolph (8th Cir., 1950), 182 F. 2d 996, 999.

An examination of the affidavits of both Special Agent Weiss and Dorothy Varble reveals that they are replete with conjecture and conclusions, which do not amount to evidence.

For example, Special Agent Weiss says [Tr. 16]:

> "* * * Mr. Hoffritz saw that I was working at the records Mrs. Varble had previously given to me * * * Mr. Hoffritz took these credentials in his hand and appeared to examine them * * *" [Tr. 17] "* * * The course of my examination of Mr. Hoffritz' records was primarily that of any accountant * * *" [Tr. 18] "That at no time did your affiant attempt to, or in fact, deceive or misrepresent to Mr. Hoffritz his capacity as a Special Agent of the Bureau of Internal Revenue, but in fact did fully inform Mr. Hoffritz on several occasions that your affiant was directed to investigate Mr. Hoffritz' tax obligations for the period commencing with the year 1948 through 1951, and your affiant fully believes that Mr. Hoffritz was willing to and most voluntarily turned over to your affiant for inspection all * * *" [Tr. 19] "* * * the books and records that your affiant reviewed and inspected during the course of his stay in Mr. Hoffritz' office and place of business * * *."

In his further affidavit, Special Agent Weiss said [Tr. 39]:

> "I conduct the preliminary investigation of individuals and corporate taxpayers involving suspected

income and other tax fraud cases. When more definite information is secured of the possible evasion of income and other taxes, a case number for the case is secured, the cooperation of an Internal Revenue Agent is requested, and the investigation proceeds on a joint basis with the revenue agent. This may result in either civil or criminal proceedings. If the preliminary investigation by the Special Agent does not indicate a possible evasion of income and other taxes, but does indicate a tax deficiency, the investigation is turned over to the Internal Revenue Agents for their completion of the case.

"Internal Revenue Agents conduct preliminary investigations of individuals and corporate taxpayers, which in some instances involve suspected income and other tax fraud cases. When information is secured of possible fraud, the investigation is discontinued, a report is written and the cooperation of a Special Agent is requested, and the investigation then proceeds on a joint basis * * *."

[Tr. 40]:

"On April 7, 1953, I was assigned to conduct an investigation of the income tax liabilities of Charles W. Hoffritz, doing business as Glo-Dial Clock Company, on a preliminary basis. The books and records of the Glo-Dial Clock Company were turned over to me on a voluntary basis by Mr. Hoffritz. During the audit of the books and records, which took place between April 14, 1953, and May 1, 1953, Mr. Hoffritz visited the office assigned to me on the premises of the company, several times a day, and discussed various topics on a voluntary basis, such as personal history, prior audits by the Internal Revenue Service, etc."

It appears that the trial judge would have granted an injunction if appellant could have proved that he was entitled to it. An injunction will be granted to prevent a prosecutor from using evidence obtained in violation of one's Constitutional rights to accomplish that person's indictment.

For example, see:

GoBart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153;

Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574;

In such an injunction suit, the plaintiff, of course, has the right to a trial on evidence, not on affidavits, unless the record justifies a summary judgment.

In the instant case, no motion was made by the government for a summary judgment; and it is submitted that the conflicting factual matters contained in the several affidavits presented a genuine triable issue.

Conclusion.

Appellant respectfully submits that the District Court had jurisdiction of this cause, and that the fraud and deceit practiced by Special Agent Weiss were equivalent to a search and seizure in violation of appellant's Constitutional rights, and for all the reasons set forth.

The judgment should be reversed.

Respectfully submitted,

BERNARD B. LAVEN,

Attorney for Appellant.